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EXTRINSIC EVIDENCE IN RESPECT TO WRITTEN INSTRUMENTS.*

The title of the paper which I have the honor to read this morning is in striking contrast with the topics which have been selected by the distinguished gentlemen who follow me on the programme. As befits one who comes from the quiet and seclusion of what may be termed the cloister of the law, I have chosen for my theme the consideration of results already reached; while they, fresh from the heat and dust of the arena, will speak to you of "Changes in Legislation" and "The Readjustment of the Law." And this is natural and right. In the language of Von Ihering in his brilliant essay, "The Struggle for Law," "All the law in the world has been obtained by strife. Every principle of law which exists had first to be wrung by force from those who denied it; and every legal right—the legal rights of nations as well as those of individuals—supposes a continual readiness to assert it and to defend it. The law is not mere theory, but living force." It might well be expected, therefore, that the "mighty men of valor," who have "gone down to the battle" in this ceaseless conflict for legal right, should report to their comrades what readjustment of the lines and what new weapons are needed; while to one whose humbler duty it has been to "tarry by the stuff," it may be permitted to furnish, as it were, an inventory of some of the weapons already in the legal armory, to show when they are available and when their use is forbidden by the rules of war, and thus perhaps to render some slight assistance to the fighting men when next they shall be called on to encounter the enemy.

It will not be supposed by an audience already familiar with the subject, that I propose, within the limits proper for this paper, to

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consider, in all its aspects, a branch of the law so extensive as that which is covered by the title "Extrinsic Evidence in respect to Written Instruments." My purpose is to confine the discussion to the use which may properly be made of extrinsic evidence in the interpretation of a valid written instrument, of a contractual or dispositive character, assuming such instrument to exist, and to be brought before the court for construction only. I shall thus avoid any inquiry as to the use of extrinsic evidence to show the invalidity of the instrument on the ground of want of delivery the non-performance of a condition precedent, fraud, illegality, and the like. Nor shall I stop to consider the rule of substantive law which forbids the use of parol evidence to "contradict or vary the terms of a valid written instrument." 1 Greenlf. Evid., § 275, *et seq.* On the contrary, I shall assume that the evidence is offered in aid of the construction of the instrument, and not avowedly to destroy it or to substitute a different instrument in its stead. And while the doctrines to be considered are equally applicable to all legal or solemn instruments,[1] it will conduce to brevity and clearness to take a will as the best type of such instruments, since it is upon wills that questions of interpretation most frequently arise, and the cases on wills furnish the best illustrations of the subject. Let us, then, in obedience to the injunction of old Bracton—"and it is commonly said that you must first catch your buck and afterwards skin him"[2]—assume the existence of a valid written will, and proceed to inquire what use can properly be made of extrinsic evidence in aid of its interpretation.

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1. Thus in Thayer's "Cases on Evidence," p. 928, note 1, it is said: "In considering Wigram's Propositions, it is not to be supposed that the rules relating to wills are essentially different from those concerning other solemn instruments." So in Stephen's "Digest of the Law of Evidence," the author considers in Art. 91, "What Evidence may be given for the Interpretation of Documents"; and in Note XXXIII of the Appendix he says: "Article 91, indeed, will be found to differ from the six (seven?) propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills." See also Blackburn's "Contract of Sale," p. 50, note; Grant *v.* Grant, L. R. 5 C. P., pp. 728-9; 2 Taylor, Evidence, § 1226.

2. See Bracton's "Laws and Customs of England," Book 4, chapter 31, 191 b., where the Latin is, "Et vulgariter dicitur, quod primo opportet cervum capere, et postea cum captus fuerit illum excoriare."

In order to answer this question it becomes necessary to determine the true object of legal interpretation, for the means to be employed must be adapted to the end in view. What is it that the judicial expositor seeks to ascertain—is it the meaning of the words or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete, and the answer must be either the one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of words varies with the circumstances under which they are used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what the writer meant to have said, but did not, is foreign to the inquiry; and *voluit sed non dixit* is the law's epitaph on a will which thus fails of its purpose. We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but it must be the meaning of his words—of the words as he has used them—the meaning which they have "in the mouth of this party," to use the language of C. B. Eyre. *Gibson* v. *Minet*, 1 H. Bl., 615. For, as has been well said by Wigram (Ext. Evid., Pl. 105), "Courts of law recognize that natural dependence which exists between language and the circumstances with reference to which it is used, and which makes a knowledge of such circumstances necessary to a right interpretation of the language." And in another place (Pl. 59) he contrasts the evidence applicable to the purpose of determining the meaning of the words in the abstract with that resorted to in order to determine their meaning in the will.[3]

3. In a valuable paper on "The Principles of Legal Interpretation," read before the Judicial Society of England, by F. Vaughan Hawkins, Esq., afterwards author of the well-known treatise on the construction of wills, it is contended (Jurid. Soc. Papers, Vol. II, p. 298, et seq.), that the office of the interpreter is to discover the intention of the writer—the meaning of the writer, and not the meaning of the words. But as Mr. Hawkins is careful to state that by intention throughout his paper he means "not a mere inchoate act of the mind, not that which a person intended to do, but took no step towards doing, but something which as a mental act was complete, and which the writer endeavored to express by the words he made use of, although these words in fact express his meaning more or less imperfectly"; and as he further admits that the intention is unavailing

We have defined judicial interpretation as having for its ultimate object the meaning of the words as used by the writer—this being the equivalent of the legal intention, *i. e.*, the intention which the law recognizes as operative and dispositive. But it must not be supposed that the actual use of words by a testator can always be taken cognizance of by a court of construction, and given effect as determining his will. For there are rules of law, and legal rules of construction, which fix the use of certain words, or forms of expression; and the testator is held to have used them in the technical legal sense, though the judicial expositor may be persuaded to the contrary. I need not remind this audience of the rule in Shelley's case—now happily defunct in this Commonwealth—nor of the meaning formerly attached to the words, "if he die without issue." And a notable example was formerly found in a devise "to A," without words of limitation,

unless sufficiently expressed in the writing, it would seem that this differs but little from ascertaining the meaning of the words as used by the writer. On the other hand, it is frequently said that in expounding a will the question is, not what was the intention of the testator, but what is the meaning of the words he has used. See Rickman *v.* Carstairs, 5 B. & Ad., 663; Doe *v.* Gwillim, 5 Id., 129; Grey *v.* Pearson, 6 H. L. C., 106. And in several Virginia cases it is said that "the inquiry is not what the testator meant to express, but what the words he has used do express." See Wooton *v.* Redd's Ex'or, 12 Gratt. 196, 207; Burke *v.* Lee, 76 Va. 386, 388; Senger *v.* Senger, 81 Va. 687, 696. But it is not believed that by the above expressions the learned judges meant to deny the proposition that the object of interpretation is to ascertain the meaning of the words as used by the writer. Thus in Grey *v.* Pearson, 6 H. L. C., 106, it is said by Lord Wensleydale, "The will must be in writing; and the only question is, what is the meaning of the words used in that writing"; but he immediately adds that in order to ascertain the meaning of the words, "every part of it (i. e., the will) must be considered, with the help of those surrounding circumstances which are admissible in evidence to explain the words, and put the court as nearly as possible in the situation of the writer of the instrument"—which shows that by the expression "meaning of the words used in the writing" he intends not the meaning of the words in the abstract, but their meaning as used by the writer upon the particular occasion. And see article by Francis Morgan Nichols, Esq., on "The Rules which ought to govern the admission of Extrinsic Evidence in the interpretation of Wills" (2 Jurid. Soc. Papers, 351), where it is suggested that the opposing views as to the object of interpretation can be reconciled if the problem of interpretation be put in either of the two following forms: "What is the intended meaning of the words, or in what sense did the writer intend his words to be understood?" It will be seen that this is in effect the same thing as the meaning of the words as used by the writer. And see Hawkins on Wills, p. 1; Leake's Dig. Contracts, p. 217.

which *per se* (*i. e.*, without aid from the context) conferred on A a life estate only, though judges have frequently confessed that nine times out of ten this was contrary to the testator's intention. *Kennon* v. *McRoberts*, 1 Wash. (Va.), 96.

And it should also be remarked that though the aim of interpretation is to discover the meaning of the words as used by the testator, it is not always possible to do so, either for want of evidence, or because the law excludes the evidence which is offered; and the will fails for uncertainty. Let us, then, expand our definition of the interpretation of a legal document, and say that it consists in ascertaining, by such evidence as the law permits, the meaning of the words as used by the writer, provided a different meaning be not required by rules of law or legal rules of construction.[4]

Having now ascertained the object of judicial interpretation, the next inquiry is, How is that object to be effected? How can we discover the meaning of the words as used by the writer? This is equivalent to the intended use of the words; and how is

4. In connection with this definition of the subject of interpretation it is proper, by way of caution, to recall the emphatic language of Eyre, C. B., in Gibson *v.* Minet, 1 H. Bl., 615: "All latitude of construction must submit to this restriction—namely, that the words may bear the sense which by construction is put upon them." And in the language of Sugden (Attorney-General *v.* Drummond, 1 D. & W., 367): "When the court has possession of all the facts which it is entitled to know, they will only enable the court to put a construction on the instrument consistent with the words; and the judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear." For cases in which this rule of construction was probably violated, reference is made to Beaumont *v.* Fell, 2 P. Wms., 140; and Langston *v.* Langston, 8 Bligh, 167; S. C., 2 Cl. & F., 194.

It should further be remembered that mistakes in wills cannot be corrected in order to change their construction. Not even a court of chancery has jurisdiction for that purpose. A mistake may be corrected by construction, if notwithstanding the mistake the context, properly expounded by the aid of the facts, shows clearly what is meant; but this is as far as the court can go. Goode *v.* Goode, 22 Mo., 518 (66 Am. Dec., 630, and note); Sturgis *v.* Work, 122 Ind. 134 (17 Am. St. Rep., 349). And yet there are cases where the testator, under a mistake as to the state of his property, has made one bequest, and the court has taken the liberty to conjecture what he would have intended if he had known the true state of the facts, and has decreed accordingly. See for examples, the English cases of Selwood *v.* Mildmay, 3 Vesey, 306, and Lindgren *v.* Lindgren, 9 Beav., 358, and a case recently decided by the Supreme Court of Pennsylvania, Washington and Lee University's Appeal, 111 Pa. St. Rep., 572—all of which are believed to be wrong upon principle.

this intention to be manifested? At the outset, there is a presumption that a writer uses ordinary words in their ordinary meaning; and constructs his sentences according to the rules of grammar, of which the court takes judicial notice; and hence the lexicographical and grammatical sense of the words is also, *prima facie,* their meaning as used by the writer. And unless this presumption is rebutted by the context, or there is a difficulty in applying the words to the facts of the case, unless they are insensible when brought into contact with the facts, the maxim of Vattel applies: "It is not permitted to interpret what has no need of interpretation," and the writer is taken to mean what he says. And this presumption that words are used in their strict and primary sense will not be affected by the mere fact that when so interpreted the will may seem capricious and unreasonable, or even cruel and unjust. For the court must interpret the will of the testator, not make his will for him; and he may have had secret motives of which the court is ignorant. At all events, to the suggestion that his will is unreasonable, he has the legal right to reply, as does the Roman matron in the satire of Juvenal, *"Hoc volo, sic jubeo, sit pro ratione voluntas."*[5]

It is also a principle of interpretation that a precisely named legatee must take, at least if the testator knew of his existence, though some other person, partially described by the words, may seem to be the one whom the testator ought to have intended. See *Am. Bible Society* v. *Pratt,* 9 Allen (Mass.), 109; *Tucker* v. *Seaman's Aid Society,* 7 Met., 188. Thus in *Mostyn* v. *Mostyn,* 5 H. of L. Cas., 155, it was suggested that the name "John" in the will was a mistake, and that the testatrix meant Thomas. But the Lord Chancellor said: "I think it impossible for a court of justice to act on that suggestion. We cannot ask the testatrix in her grave what she meant. If we could she might say, 'I said John, and I mean John.' There is nothing in the will inconsistent with that.

5. "Testators have a right to be eccentric, capricious, arbitrary, and, so far as the term may be used, unjust; nor does it seldom, I believe, happen that they have reasons known to themselves, though not to those who expound their wills, for dispositions seemingly strange and unreasonable. Testators are not bound to have good or any reasons for what they do, or when they have reasons to state them." Per Knight Bruce, L. J., in Hart *v.* Tulk, 2 De G., Mc N. & G., 313. See, also, Bird *v.* Luckie, 8 Hare, 306.

And, therefore, what we are now asked to do might be in direct violation of the will of the testatrix."[6]

But a will may contain words not in ordinary use, and yet they may be familiarly employed in some locality, or in some trade or profession, or in a sense peculiar to a religious sect, or the like. In such cases the provincial or technical or sectarian meaning will be adopted by the interpreter as the meaning of the words as used by the writer. Indeed, a will may be written in whole or in part in cipher or in shorthand, and then the signs on the instrument, as used by the writer, must be translated into words, and the will interpreted accordingly. It is in order to include this case, no doubt, that Sir Fitzjames Stephen defines the construction of a document to be "ascertaining the meaning of the signs or words made upon it and their relation to facts." An example under this head is found in the case of *Kell* v. *Charmer*, 23 Beav., 195, where the will read, "I give and bequeath to my son William the sum of i. x. x. To my son Robert Charles the sum of o. x. x." And evidence was admitted to show that the testator was a jeweler, and in the course of his business used certain private marks or symbols to denote prices or sums of money, and that by such system the letters i. x. x. and o. x. x. denoted £100 and £200 respectively; and this meaning of the letters as used by the testator in his business was adopted as their meaning as used in his will, and the legacies were decreed accordingly.

But though the words are in ordinary use, and have a strict and primary meaning, it may nevertheless be manifest from the context of the will that, as used by the testator, their meaning is not their primary sense, but some less proper or secondary sense, and they will be so interpreted; and this, notwithstanding their primary sense may be fixed by a legal rule of construction, as

6. For an example under the rule that a precisely named legatee must take, however improbable it may be that he was really intended by the testator, unless such intent be irrational, see In re Peel, 2 L. R. P. & D. 46, of which case Mr. Taylor says (2 Taylor on Evidence, § 1202, n. 6) that it "may be considered by some unprofessional men as a reduction of this rule to an absurdity." As indicating that the courts will evade the rule whenever it is possible to do so, see in re Wolverton Mortgaged Estates, 7 Ch. D., 197. And see also Powell *v.* Biddle, 2 Dallas. 70 (1 Am. Dec. 263), a case which seems to be correctly decided, notwithstanding the sharp criticism on it by Shaw, C. J., in Tucker *v.* Seaman's Aid Society, supra.

distinguished from a rule of law. In this case the Court, in the language of Lord Cairns in *Hill* v. *Crook* (L. R. 6 H. of L. Cas., 265, 285), uses the context "as the dictionary from which to find the meaning of the terms he has used," and they are interpreted "according to that nomenclature, and not in their ordinary sense."[7]

But apart from the context of the will there is another way in which the presumption that the words were used in their ordinary sense may be repelled. For, to use the language of the Supreme Court of Massachusetts (*Doherty* v. *Hill,* 144 Mass., 468), "in every case the words must be translated into things and facts by parol evidence"—that is to say, the court must inquire as to the application of the words to the facts to see if the words can be made operative. This process is thus described by Judge Moncure (*Roy* v. *Rowzie,* 25 Gratt., 599): "The court of construction, with the testator's will in hand, looks for the object of his bounty and the thing intended to be given, and expects them to answer precisely the terms of description given of them in the will. Generally they do, and there is no difficulty. Often they do not, and sometimes there are two or more objects or subjects which answer precisely, or equally, the description contained in the will."

7. An example of this use of the context of a will is furnished by a very recent English case In Goods of Ashton, 1892, p. 83, where it is said by Jeune, J.: "In this will the testator, to use the language of Lord Cairns in Hill *v.* Crook, 'has made us a dictionary.' If he had done it in terms, there would have been nothing more to be said; but he seems to me to have done it practically, because he has used the word 'nephew' where it clearly meant an illegitimate grandnephew, and he has also described as his 'niece' a person who was his illegitimate niece. He has made his dictionary for us in an unambiguous way, and if we are entitled to use that dictionary, it makes the case clear." And he decided that he was entitled to use it, and decreed accordingly. The meaning of the words as used by the testator, in a particular text of his will, can also be ascertained from the testator's testamentary plan and purpose as apparent on the face of the will. Thus in Byng *v.* Byng, 10 H. L. Cas., 170, it was held that the rule in Wild's Case (which is a rule of construction and not a rule of law, see Clifford *v.* Koe, 5 App. Cas., 447), would yield to an intent manifested by the whole context of the will, so that in a devise "to A and her children," though there were children of A living at the "time of the will," the word "children" was construed as a word of limitation, thereby creating an estate tail. For the peculiar doctrine in Virginia as to the effect of a gift "to A and her children," see Mosby *v.* Paul's Adm'r, 88 Va., 533, where the previous Virginia cases are cited.

Here, then, we find a predicament of facts which calls for the use of extrinsic evidence in aid of the interpretation of the writing. But extrinsic evidence of what? How shall the meaning of the words as used by the testator be discovered when dictionary and grammar fail us, and the context affords no assistance. There are but two possible sources of information—viz., the facts and circumstances of the case, and the intention of the testator as declared by him before, at, or after the making of his will. For though the difficulty was caused by the facts, yet it is possible that it will disappear on further inquiry into the facts; thus justifying the wisdom of the nursery paradox:

"There was a man in our town,
And he was wondrous wise;

(This describes the judicial expositor, of course.)

"He jumped into a bramble bush,
And scratched out both his eyes.

(This is the unhappy situation of the aforesaid expositor after his first encounter with the facts; yet, mark you:)

"But when he found his eyes were out,
With all his might and main
He jumped into another bush,

(More facts, obviously.)

"And scratched them in again."

But this is not always the happy issue out of all his troubles of the judge who journeys, will in hand, among the facts surrounding the testator. It sometimes happens that from those facts there is "no light, but rather darkness visible," and the interpreter must turn elsewhere for help; or—that tragedy of judicial interpretation—the will must fail for uncertainty. But whither can he turn? The text, context and facts have been appealed to in vain. There is but one recourse; the testator must be allowed himself to declare his meaning; his extrinsic declarations of intention must be received in evidence, and actual intention, as thus manifested, must be invoked to throw light on the meaning of the words as used in the will.

We have now seen all the extrinsic evidence that can be offered

in aid of the interpretation of a will, and we find that it is divisible into two great classes. Of these the first consists of material facts, and these may concern the testator, his property, his family, the claimant or claimants under the will, their relations to the testator, &c. The second class, on the other hand, is confined to direct evidence of the testator's actual intention, such as his declarations of intention, his informal memoranda for his will, his instructions for its preparation, and his statements to the scrivener or others as to the meaning of its language. And this division of extrinsic evidence not only exists in the nature of the case, but is of the utmost practical importance in the interpretation of wills, as the rules for the admissibility of the two kinds of evidence are not the same. Let us call the first kind *the facts and circumstances,* and use the expression *declarations of intention* to describe all extrinsic statements by a testator as to his actual testamentary intentions—*i. e.,* as to what he has done, or designs to do, by his will, or as to the meaning of its words as used by him. And with this understanding of the terms, let us now inquire what use can be made, in the interpretation of a will, of the facts and circumstances, and what of the testator's declarations of intention.

As to the facts and circumstances, the law is that they are always admissible in evidence in a case of disputed interpretation; and this is clearly right.[8] For the object of interpretation is to ascertain the meaning of the words as used by the testator; what the words represented in his mind; what he understood to be signified by them; and for this purpose it is indispensable that the expositor should know the situation of the testator; the state of his family and property; his relations to persons and things; his opinions and beliefs; his hopes and fears; his habits of thought and of language; in a word, that the interpreter should identify himself with the testator as to knowledge, feeling, and speech, and thus, scanning the words of the will from the testator's point of view, decide as to their meaning as used by him. In the language of Chief Justice Marshall (*Smith*

8. See Wigram, Ext. Evid., Prop. V.; 2 Wharton Evid., § 998; 2 Taylor, Evid., § 1198; 1 Redfield, Wills, p. 621; 1 Jarman, Wills, p. 422; Allgood *v.* Blake, L. R., 8., Eq. 160.

v. *Bell,* 6 Peters, 74): "In the construction of ambiguous expressions the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees; the affection subsisting between them, the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and in ascertaining the meaning in which the testator used them." And this language is quoted and approved in *Colton* v. *Colton,* 127 U. S., 300. And in *Hatcher* v. *Hatcher,* 80 Va., 169, it is said: "In order to better comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person whose will he is called on to construe; and, with the aid of such extrinsic evidence as is admissible for the purpose, to possess himself of the condition of the testator and his family, and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property." See, also, *Miller* v. *Potterfield;* 86 Va., 876.

It has been seen that evidence of the surrounding facts and circumstances is always admissible in aid of the interpretation of the will—*i. e.,* as explanatory of the meaning of the words as used by the testator. It may be of interest now to inquire how facts can explain words, and how interpretation can be influenced by the situation of the testator and the circumstances under which the will was written.

In the first place, it frequently happens that when the words are capable of two meanings, the facts negative the possibility of one meaning, and thus leave the other as necessarily the meaning of the words as used by the testator. Thus, to take a case put by Lord Coke (The Lord Cheyney's case, 5 Co., 68): If a man devise his land "to my son John," and it turns out that at the date of the will he had two sons named John, there arises a difficulty as to the son intended by the testator. If now it be shown that the elder son had been long absent and unheard of, and was believed by the testator to be dead, these facts negative the supposition that the word "John" meant for him his elder

son, and so the name, as used by him, in the light of the facts, signifies the younger son, and thus the facts have become explanatory of the word.

Again, when the words describe equally two different things the situation of the property may show clearly what is meant. Thus, to take a case put by Wigram:[9] "Suppose a testator, resident in India, to bequeath to A B, who was also in India, some specific chattel—*e. g.*, a gold watch—and that the testator had with him a specific chattel of the kind described, and that he was also owner of another of the same description which he had left in England twenty years before." Any one would say that under these circumstances "my gold watch" meant to the testator the gold watch in India; that this was the meaning of the words as used by him. The reason given by Wigram is that no testator, if he had intended to bequeath the watch he had left in England, could possibly have thought the description he had used sufficient, whereas it would be otherwise with the watch in India. In other words, when we understand the facts in the case, and place ourselves in the situation of the testator, we see that what was in the abstract an insufficient description becomes sufficient from his point of view, and the interpreter is judicially persuaded of the meaning of the words as used by him. And while the effect is to construe "my gold watch" as equivalent to "my gold watch *in India,*" the words "in India" are not added to the will *in order to* its interpretation, but *by* the interpretation of the will, in the light of the facts, it is found that the words "my gold watch," as used in the will, *mean* my gold watch in India, and they are therefore construed accordingly.

In the third place, facts may be directly explanatory of the meaning of the words as used by the testator when it is shown that he has been in the habit of calling certain persons by pet-names or nick-names, or of using any words with a meaning peculiar to himself. Thus in *Lee* v. *Pain,* 4 Hare, 251, the testatrix, who was an old lady, had been a great friend of Rev. Mr. Bowden, and of his daughter, Miss Bowden; and on the

9. Extrinsic Evidence in Aid of the Interpretation of Wills, Pl. 73 and 77.

marriage of the latter to Rev. Mr. Washbourne she seems not to have taken kindly to the new name, but called her Mrs. Bowden, instead of Mrs. Washbourne; and when there was a daughter born to Mrs. Washbourne, she called the daughter, with a perverse consistency, Miss Bowden. And when her will was read—to show how completely she had been living in a past generation of names—it was found to contain legacies "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden." And yet in the light of the facts, there being no persons to answer either the names or the description in the will taken literally, there could be no doubt, that, in spite of the curious misuse of words, the words as used meant for the testatrix, "Mrs. and Miss Washbourne," and it was held that they were entitled to the legacies.

There is still another way in which facts may be explanatory of words in a case of disputed interpretation. In the three cases already considered there was no question as to the testator's motives. But suppose the facts offered in evidence show that the situation of the testator towards one of the two claimants was such that he was prompted by the strongest motives of affection, or gratitude, or natural duty (or, perhaps, all three combined) to make a provision by will for him; whereas none of these reasons existed in favor of the other, but the exact reverse. Now, if the words in the will should equally describe both claimants, or should be in part applicable to one and in part to the other, these facts showing motive, when brought into contact with the words in the will, tend, as the subjective antecedents of intention, to render it probable that, as used by the testator, the words describe one claimant rather than the other, and so become explanatory of the words. And thus probability becomes the guide of interpretation, as it has been said to be the guide of life. And if it be objected that we have here made use of actual intention in order to ascertain the meaning of the words, the answer is that actual intention, so far as it may be involved in the facts, and provided it is not made the subject of direct proof, as itself a substantive, independent fact, is always admissible in evidence, in connection with the words in the will, and becomes

explanatory of the words, and of evidential value, because it is relevant to the real issue—the meaning of the words as used by the testator.

We are now ready to take up the second class of extrinsic evidence, viz.: The testator's declarations of intention as contrasted with the facts and circumstances of the case. And here, in the language of Lord Coke, we must "note a diversity" in this respect, that while the material facts are always admissible, there is but one situation in which the judicial expositor has the right to invoke the aid of declarations of intention, and that is where the words in the will describe well, but equally well, two or more persons, or two or more things, and such declarations are offered to show which person or which thing was meant by the testator—*i. e.*, by the words in the will as used by him. This is the case of "equivocation," as it is called by Lord Bacon, and it is exemplified by a devise "to John Cluer, of Calcot," when there are two persons who answer that description; or a devise of "the close in Kirton, now in the occupation of John Watson," when the testator owns two closes in Kirton, both, at the date of the will, in the occupation of John Watson. *Jones* v. *Newman,* 1 W. Bl., 60; *Richardson* v. *Watson,* 4 B. & A., 799.[10]

Before proceeding to inquire more minutely when the case does or does not amount to "equivocation," let us pause to con-

10. For more recent cases of equivocation, see Bodman *v.* American Tract Society, 9 Allen (Mass.) 447, where the bequest was to "The American Tract Society," and there were two societies bearing that corporate name; and Gilmer *v.* Stone, 120 U. S., 586, where a bequest was of "the remainder of my estate to be equally divided between the board of foreign and the board of home missions," it appearing that various churches have boards of home and foreign missions. The ambiguity in this case, however, was removed by aid of the facts and circumstances without resort to declarations of intention. And see Phelan *v.* Slattery, 19 L. R., Irish, 177, concerning which the following statement is taken from Thayer's Cases on Evidence, p. 1045, note: "A devise to my nephew, where there were several nephews, was allowed to carry the property to one of them, Thomas Dee (1) on evidence of merely explanatory facts, which the Vice-Chancellor declared to be sufficient by itself; and (2) on the testator's direct statements of intention, furnished by the solicitor who drew the will. 'This evidence,' it was held, 'is admissible here, as the case is one where the extrinsic evidence has shown that the description in the will is alike applicable, with legal certainty, to not only Thomas Dee, but to one or more other nephews.'" See also Bennett *v.* Marshall, 2 K. & J., 740; Lee *v.* Pain, 4 Hare, 249; re The Clergy Society, 2 K. & J., 615; Doe *v.* Allen, 12 Ad. & E., 451.

sider the nature of this "evidence of intention," as it is sometimes called, and the reasons for its exclusion in all cases save one.

It will be remembered that the ultimate object of judicial interpretation is to ascertain the meaning of the words as used by the writer, or, as it is sometimes put, the intention of the writer as expressed in the words. Now, as the will must be in writing, no other intention than that contained in the will itself can be recognized by the court as operative and dispositive; and it might be thought that the testator's actual intention, established by the testimony of witnesses as to his extrinsic declarations, an intention outside of the will, and which might never extend to the point of executive volition, and which might exist though no will was in fact ever made, must, in the nature of the case, be irrelevant and inadmissible in evidence. But the truth is, that such intention, when a will has been made and a difficulty arises in its interpretation, is admissible in evidence on the same ground on which it is allowed to prove the surrounding facts and circumstances, viz.: as being evidential in its nature and tending to show the meaning of the words as used by the testator. For, in the language of Lord Abinger (in *Hiscocks* v. *Hiscocks,* 5 M. & W., 363): "The intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which in their ordinary sense may properly bear that construction." Thus an inference is drawn from the actual intention, used evidentially, to the operative intention, expressed in the words of the will; and though they are found to coincide, yet the testator's disposition of his property is effectuated by the words of the will and not by the outside (or actual) intention, of which the law takes cognizance as a means to an end, by reason of its probative force, and not as itself the end in view.[11]

11. The ground on which declarations of intention are receivable in evidence in the case of "equivocation" has been variously stated. In Wigram on Wills, Pl. 152, it is said: "As to those cases in which the description in the will is applicable indifferently to, and sufficiently describes, more than one subject, the principle upon which they proceed may, perhaps, be explained; for in such cases, although the words do not ascertain the subject intended, they do describe it. The person held entitled in these cases has answered the description contained in the will. The effect has only been to confine the lan-

But, it may be asked, if this is the true theory on which declarations of intention are received in evidence—if they are really

guage to one of its natural meanings. The court has merely rejected; and the intention which it has ascribed to the testator, sufficiently expressed, remains in the will. * * * Or perhaps the more simple explanation is that the evidence only determines what subject was known to the testator by the name or other description he has used." In Paton *v.* Ormerod, Probate Division, 1892 (Thayer's Cas. Evid., 1062), it is said: "If two or more objects equally fulfill the description found in the will, in such case, and as Lord Abinger says in Doe *v.* Hiscocks, 5 M. & W., 368, in such case only, recourse may be had to the declarations of the testator, because the problem is otherwise insoluble, and because such recourse, under such conditions, constitutes no attempt to vary by parol evidence the terms of the will." And in Bodman *v.* American Tract Society, 9 Allen (Mass.), 447, Bigelow, C. J., thus speaks of declarations in a case of equivocation: "Such evidence does not vary the written language. It only enables the court to reject one of the two subjects to which the description applies, and to ascertain which of them the testator understood to be signified by the words used in the will. It is necessarily assumed in all cases where such latent ambiguity arises in the interpretation of a will by the existence of two persons or objects which answer the description given by the testator, that he was ignorant of the fact, or did not remember that the two were known and called by the same name. This assumption rests on the ground that it is reasonable to suppose that if the testator had known of the existence of two objects bearing the same name he would have made the description more definite, so as to remove the ambiguity. The law permits oral evidence to be introduced in such cases for the purpose of showing which subject was known to the testator, or which he had in mind when he inserted the name in his will." Mr. Wharton (on Evid., § 992), disposes of the difficulty as follows: "When it is doubtful as to which of two or more extrinsic objects, a provision in itself unambiguous, is applicable, then evidence of a testator's declarations of intention is admissible; not, indeed, to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects. When this is done the court, so it is held, applies the will by determining which of these extrinsic objects it designates." In Tucker *v.* Seaman's Aid Society, 7 Metc. (Mass.) 188, it is said by Shaw, C. J., speaking of a devise of "my manor of Dale" to my nephew, John Smith, "when the testator has two manors of Dale, and two nephews named John Smith, perhaps it would be more consistent with principle, if this were a new question, to hold that such a bequest [devise?] is void for uncertainty, and so let in the heir; it being in truth impossible to see by the will which nephew took or which estate passed. But as the will does clearly describe a particular estate, and names a person in being as the object of the testator's bounty, it was early held as the legal construction of the statute that from the necessity of the case extrinsic evidence must be admitted to show which was intended." But the true doctrine is believed to be that, on principle, declarations of intention would always be admissible as explanatory of the testator's words; and their exclusion in other cases than that of "equivocation" is the result merely of a rule of evidence based on public policy. See "The 'Parol Evidence' Rule" (by Prof. Thayer), 6 Harv. Law Review, 417; Thayer's Cas. on Evid., p., 1014-1019; Hawkins on Wills, p. 8, et seq.

evidential—why are they not admitted in all cases, instead of being limited to the single case of equivocation? The answer is that such evidence is regarded as peculiarly dangerous, and is therefore confined, for reasons of policy, to that one case in which the words of the will describe well, but equally well, two or more persons or things, and in which the judicial expositor might well exclaim with Captain Macheath in the "Beggar's Opera":

"How happy could I be with either,
Were t'other dear charmer away."

The will "sees double," and the effect of the evidence is to correct this defect of vision by rejecting one of the two objects to which the description applies, whereby the other becomes at once ascertained, as described by the words as used by the testator.

Declarations of intention are receivable, therefore, in one case only, and that is when each of a plurality of subjects or objects follows and fills out the description in the will; and when declarations in favor of either will accord with the words in the will. In all other cases they are rejected, as the law will not permit verbal declarations to influence the construction of the will, much less to compete with the written declarations contained therein. As has been well said: "Evidence so nearly allied in character to that furnished by the will itself presents an aspect of rivalry to the will which raises a presumption against its reception. . . . Again, evidence of this kind presents peculiar facilities to fraud. It may easily be imagined or invented; and, when fraudulently produced, is difficult of detection. If a witness swears that a deceased testator, in a private interview, explained to him the sense in which he wished some clause of his will to be understood, such evidence, however false, cannot possibly be disproved."[12] But with regard to the extrinsic proof of facts, it is added: "It is obvious that there is not the same danger of fraud in the employment of evidence of this nature as in the case of direct proof of intention.

12. For an elaborate statement of the objections to declarations of intention in aid of the interpretation of wills, see 2 Wharton Evid., § 992.

The facts upon which arguments are founded, bearing indirectly on the question of interpretation, are generally either matters of notoriety or such as may be proved without any extraordinary difficulty. The proof of the testator's condition in life, of the nature and extent of his property, of the circumstances of his family, of the relation in which he stood to any person named in his will, is not accompanied with any particular uncertainty or any extraordinary temptation to fraud and perjury. Again, facts of this kind do not assume any aspect of rivalry with the declarations of the will. They are altogether different in character, and the knowledge of them merely tends to place the interpreter, according to the expression so frequently used, in the position of the testator, and to enable him to scan the language from the same point of view." (2 Jurid. Soc. Papers, p. 359, Article by F. M. Nichols, Esq.)[13]

13. It should be borne in mind that the "declarations of intention" considered in this paper are such only as are offered as bearing upon the interpretation of the words of the will; and that no reference is made to the use of declarations of intention upon the issue of fraud in procuring a will, undue influence, and the like. For a discussion of this use of such declarations, see 1 Redf. on Wills, p. 542, et seq.; 2 Wharton on Evid., § 1012. Nor is it within the scope of this paper to discuss the cases in which declarations of intention are admissible "to rebut an equity," as the phrase is. See on this subject 1 Greenleaf Evid., § 296; 2 Taylor Evid., § 1227, et seq.; 1 Redf. Wills, p. 642, et seq. And it should further be remembered that while on the question of interpretation declarations of intention are not admissible except in the case of "equivocation," yet collateral facts may be proved by the testator's declarations, and these may affect indirectly the interpretation. In the language of Wigram (Ext. Evid. Pl. 104): "Declarations by the testator on a point collateral to the question of intention may, however, be evidence of an independent fact material to the right interpretation of the testator's words." And see Wigram, Pl. 195, where it is stated that such declarations are not confined to the case of equivocation. See, also, 2 Taylor Evid., § 1210; Hawkins Wills, p. 10. But see 1 Greenleaf Evid., § 291, where it is erroneously said that "declarations tending to prove a material fact collateral to the question of intention, where such facts would go in aid of the interpretation of the testator's words," are confined to those cases only "in which the description in the will is unambiguous in its application to any one of several subjects"—i. e., to the case of equivocation.

Returning to declarations of intention in aid of the interpretation of the words of a will, it is now settled in England that they are equally admissible, in a case of equivocation, whether they were made before, at, or after the making of the will. In the language of Taylor (on Evid., § 1209): "Where declarations of intention are receivable in evidence, the rule most consistent with modern authorities seems to be that their admissibility does not depend on the time when they

Another reason, no doubt, for the law's jealousy and distrust of the testator's declarations, except in the case of equivocation, is the fear that the court of construction, if allowed to know the testator's actual intention—to see in advance the answer to the problem of interpretation—would, though professing to use the intention evidentially only, be tempted to strain the meaning of the words unduly so as to make them fit the actual intention—to force the answer, as it were, and thus to allow "conjectural interpretation to usurp the place of judicial exposition." Examples of this are not wanting under the older decisions in England, which permitted the use of declarations in cases where they are not now allowed. See *Beaumont* v. *Fell,* 2 P. Wms., 140. And in *Langston* v. *Langston,* 2 Cl. and F. 194, Lord Brougham, with characteristic curiosity, peeped at the answer —*i. e.,* he looked at the draft of the will, though confessing he had no right to do so (the case not being one of equivocation), and his interpretation accorded precisely with what he found there, though he protested earnestly that he had laid the draft "entirely out of view."[14] In the case of "equivocation" however, whatever result is reached must conform to the language

were made. Contemporaneous declarations will certainly be entitled, cæteris paribus, to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them; unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done, at the time of speaking. Neither will the admissibility of the declarations rest on the manner in which they were made, or on the occasions which called them forth; for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to the impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will, of course, vary materially according to the time and circumstances." See also 1 Jarm. Wills, 756; 1 Redf. Wills, 562, et seq.; Hawkins, Wills, p. 13; 2 Wharton Evid., § 938; Browne, Parol Evidence, pp. 478-483; Doe *v.* Allen, 12 Ad. & E., 455; Hawkins *v.* Garland's Ad'mr, 76 Va. 149. But it was once held in England that the declarations must be contemporaneous with the making of the will (Thomas *v.* Thomas, 6 T. R., 671), and the law is so laid down in Wigram, Ext. Evid., Pl. 187; and there are some American cases to the same effect. See Browne Parol Evid., ubi supra.

14. See Grant *v.* Grant, L. R. 5, C. P. 727, where, referring to Langston *v.* Langston, Blackburn, J., does not hesitate to say: "I have always entertained a notion that the sight of the draft had something to do with the decision."

of the will; and while the declarations have, as between the claimants themselves, both equally described by the words, the important effect of excluding the one in favor of the other, yet the decree of the interpreter is that a person named in the will is entitled to take; and this, it is thought, can do no violence to its language.[15]

Let us now return to the important inquiry, What is an equivocation—the one case in which the law tolerates "declarations" outside of the will, and is not affrighted at the dread apparition of the testator's "actual intention," as it is called. In the language of Bacon, an equivocation arises "when one name and appellation doth denominate divers things." By Wigram's seventh proposition, "evidence of intention" is admissible only "when the object of the testator's bounty or the subject of dis-

15. The rule of evidence by which declarations of intention are allowed in the case of "equivocation," and excluded in all other cases, has not altogether escaped criticism. Thus in Charter *v.* Charter, L. R., 7 H. L. C., 304 (which was not a case of equivocation), Lord Selborne says: "If the direct evidence of intention which has been offered by the respondent, independently of the light thrown by extrinsic facts upon the words of the will, could properly be regarded, there would be no difficulty; but I think we are compelled to hold, after Doe *v.* Hiscocks, 5 M. & W., 363; Bernasconi *v.* Atkinson, 10 Hare, 345, and Drake *v.* Drake, 8 H. L. C., 172, that the court below was wrong in receiving that evidence. Why the law should be so in cases where some error of description involving a latent ambiguity has to be corrected, when evidence of the same kind is admitted in what Lord Bacon describes as cases of 'equivocation' (Maxims of the Law, Rule XXIII,) [more usually numbered XXV], I am not sure that I clearly understand; but it has been conclusively so settled by a series of authorities to which we are bound to adhere." And in "Stephen's Digest of the Law of Evidence," App'x, Note XXXIII, it is said: "The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 [of Art. 91, where the document applies in part, but not with accuracy, to the circumstances of the case], and in cases falling under paragraph 8 [cases of equivocation], or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts." In Taylor on Evid., § 1217, it is said: "It must, however, be remembered that in cases of this nature [i. e., where part of the description answers to one claimant and the remainder applies to another. See § 1215] the court—fettered by a rule which would be regarded as absurd in the ordinary affairs of life—cannot receive any declarations of the testator as to what he intended to do in making his will. This was the precise point determined in the leading case of Doe *v.* Hiscocks." And see 1 Redfield on Wills, p. 613, note 29, at end, where the author speaks of the rule which rejects "direct proof of intention" in cases other than those of equivocation as "excluding the most reliable portion of the evidence."

position (*i. e.*, the person or thing intended) is described in terms applicable indifferently to more than one person or thing." According to Taylor (on Evid., § 1206) the declarations of the testator are receivable in evidence in but one case—viz., when it appears that the description in the will is "alike applicable with legal certainty to two or more persons or things." And in *Charter* v. *Charter,* L. R. 7, H. L. 364 (decided in 1874), it is said by Lord Chancellor Cairns: "The only case in which evidence of this kind [*i. e.*, parol evidence of statement of the testator] can be received is where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things." And in *Patch* v. *White,* 117 U. S., 211, 217, it is said by Mr. Justice Bradley, speaking for the court, that the kind of ambiguity which may be removed by the declarations of the testator is "when there are two persons or things equally answering the description." And in *Senger* v. *Senger,* 81 Va., 687, 695, Judge Richardson thus summarizes the language of Judge Lee in *Wooton* v. *Redd,* 12 Gratt., 196, 207: "Declarations of the testator as to his intention to make a particular bequest, or that he had made such a bequest, is not competent evidence except where the terms in the will indifferently and without ambiguity apply to each of several different things or persons, when evidence may be received as to which of the subjects or persons so described was intended by the testator."[16]

16. In 1 Jarman, Wills (433), the opinion is expressed that though a case of equivocation should exist in a will, yet no evidence of oral declarations by the testator respecting his intention would be admissible if the surrounding circumstances disclosed reasons for the testator's preferring one person to another of the same name; and this on the ground that "there is properly no ambiguity until all the facts of the case have been given in evidence and found insufficient for a definite decision." But it is not believed, when the case is otherwise proper for the admission of declarations of intention, that they are excluded, because, without them, the doubt could be resolved in one way or the facts and circumstances; but that the declarations are entitled to be received along with the facts, and this whether they corroborate the inferences to be drawn from the facts or oppose such inferences. It does not seem reasonable that a decision should be made as between competing claimants, equally described by the words of the will, by the feeble light afforded by facts suggesting a preference by the testator for one over the other, when the testator's express declarations are opposed to such an inference. The true doctrine is that facts and declarations should both be received, and then on the whole evidence the judge must decide whom the testator meant by the words he has

From these authorities (and many others) it is established that in order to amount to a case of equivocation the language of the will must satisfy these two conditions:

1. The words of the will must be descriptive of concrete objects; that is, of some person or thing whose identification is the purpose of the declarations of intention. Such declarations are not now allowed (though it was formerly otherwise in equity)[17] to explain the meaning of ambiguous expressions in a will, not even if "the words stand in *æquilibrio,* and are so doubtful that they may be taken one way or the other." Nor are they allowed to explain generic terms, to show the extent of their meaning as employed by the testator. Such difficulties must be solved by construction, aided, it may be, by light from the surrounding facts and circumstances, but the case is not one of "equivocation" in the true sense, and no declarations of intention are receivable. (See Wigram Ext. Ev., Pl. 209; 2 Whart. Ev., § 993.) And it is on this principle that declarations of intention cannot be received to show the meaning of the word "increase" in a bequest of "a negro woman, named Jenny, and her increase" (*Puller* v. *Puller,* 3 Rand., 83, explaining *Reno* v. *Davis,* 4 Hen. & M., 283); nor to show, under a devise of "all my estate to be equally divided between the children of my deceased son Joseph and the children of my daughter Elizabeth," that the children of Joseph and Elizebeth were meant to take *per stirpes* and not *per capita.* (*Senger* v. *Senger,* 81 Va., 687.)

2. The description in the will must be equally applicable in all its parts to two or more persons or two or more things. For unless there be a plurality of objects or subjects, if the doubt arises as to a single person or a single thing supposed to be described, though imperfectly, by the words of the will, there can be no competition between subjects or objects, and without competition there is no equivocation. And though there are several competing subjects or objects, yet if no one of them "follows

used. See this view taken in Wigram Ext. Evid., p. 118, by O'Hara. See also Stephen's Dig. Evid., art. 91. And there is no suggestion in any of the recent decisions that in a case of equivocation the declarations are to be excluded until the facts have been appealed to in vain to remove the ambiguity.

17. See Pendleton *v.* Grant, 2 Vern., 517; Strode *v.* Russell, 2 Vern., 620; Hampshire *v.* Pierce, 2 Ves. Sr., 216; Wigram on Wills, Pl. 109.

out and fills the words in the will," but the description applies in part to the one and in part to the other, this is no case of equivocation, and declarations of the testator's intention are inadmissible. For this is not a case of double vision, where the will describes well, but equally well, two or more persons or things, but rather a case of verbal strabismus, where the description in the will squints, looking partly in one direction and partly in the other. The description is balanced, and while the equipoise may be broken and a decision made between the repugnant parts of the description by the aid of surrounding facts and circumstances, the case is not one which admits of the law's heroic treatment by the admission of declarations of intention. This was decided in the great case of *Hiscocks* v. *Hiscocks,* 5 M. & W., 363, and has been followed in England in *Drake* v. *Drake,* 8 H. L. C., 172, and *Charter* v. *Charter,* L. R., 7 H. L. Cas., 364, and is now regarded as settled law. Thus, in *Hiscocks* v. *Hiscocks, supra,* the devise was "to John Hiscocks, eldest son of my son John Hiscocks." But the eldest son of John Hiscocks was not named John, but Simon, so that while the name fitted one son the description fitted another; and it was held that no declarations of intention could be received in aid of the interpretation.[18]

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18. Hiscocks *v.* Hiscocks is one of a number of cases in which the name in the will fits one claimant and the description another; and it was formerly thought that in the absence of evidence the name would be presumed correct, and that the description would be rejected as erroneous, and that this was the meaning of the maxim veritas nominis tollit errorem demonstrationis. But this doctrine is now exploded in England. Thus in Drake *v.* Drake, 8 H. L. C., 172, 179, it is said by Lord Chancellor Campbell: "There is a maxim that the name shall prevail against an error of demonstration; but then you must first show that there is an error of demonstration, and until you have shown that, the rule veritas nominis tollit errorem demonstrationis does not apply. I thing there is no presumption in favor of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the bar it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed." And see this language quoted with approval by Lord Cairns in Charter *v.* Charter, L. R., 7 H. L. C., 364, 381. See, also, 2 Taylor Evid., § 1215. The disposition made by the court of Hiscocks *v.* Hiscocks (which was an action of ejectment) was as follows: "Upon the whole, then, we are of opinion that in this case there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of

But the strict letter of the above rule has been so far relaxed as to permit a case of equivocation to be made under the maxim *falsa demonstratio non nocet cum de corpore constat,* when, after rejecting the misdescription, which is applicable to no person or thing, the remainder of the description is sufficient to describe equally and with legal certainty two or more persons or two or more things. Thus, in *Careless* v. *Careless,* 1 Mer., 384, the devise was "to Robert Careless, my nephew, son of Joseph Careless." The testator had no brother Joseph, so that the words "son of Joseph Careless" were rejected as "false demonstration." This left the description: "To Robert Careless, my nephew"; and as the testator had two nephews named Robert Careless, the case was treated as an equivocation.[19]

In the light of the foregoing principles let us consider the case of *Hawkins* v. *Garland's Adm'r,* 76 Va., 149, in order to determine whether it presents a case of equivocation, and whether the testator's extrinsic declarations of intention were properly received in evidence. By the fifteenth clause of his will Samuel Garland, Sr., bequeathed as follows: "I give to each of my namesakes, Samuel G. Slaughter, son of Ch. R. Slaughter; Samuel G. White, son of Samuel G. White; Samuel, son of S. Garland, Jr., and Samuel G., son of Captain John F. Slaughter, a bond of $1,000 of S. S. railroad."

The difficulty arose as to the person intended by "Samuel G., son of Captain John F. Slaughter." At the date of the will, and for three or four years thereafter, there was no son of John F. Slaughter named Samuel G., but a few months before the testator's death a son was born to John F. Slaughter who received

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the plaintiff or the defendant. The description in fact applies partially to each, and it is not easy to see how the difficulty can be solved. If it were res integra, we should be much disposed to hold the devise void for uncertainty, but the cases of Doe *v.* Huthwaite [3 B. & Ald., 632], and Bradshaw *v.* Bradshaw [2 Y. & C., 72], and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge that arises from these facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide and direct the jury accordingly; but we think that, for this purpose, they [it] cannot receive declarations of the testator of what he intended to do in making his will."

19. See Hawkins on Wills, pp. 8 to 13, as to what constitutes an equivocal description.

that name. Hence the court very properly rejected the claim of "Samuel G., the son of Captain John F. Slaughter," and treating "Slaughter" as as manifest mistake, were called on to consider whom the testator intended to describe by the residue of the description—viz:, "Samuel G., son of Captain John F." And upon reasoning to which there is no objection, based on the language of the will read in the light of the facts of the case, the court was of opinion that Samuel G. Hawkins, son of Captain John F. Hawkins, was plainly indicated as the object of the testator's bounty. But the court went further, and admitted in evidence the parol declarations of the testator that Samuel G. Hawkins was one of the namesakes to whom he had given $1,000 by his will. And in this, it is submitted, the court erred; for the words "Samuel G., son of Captain John F. Slaughter," do not, either before or after the rejection of "Slaughter," describe well, and equally well, two or more persons. As there was no son of John F. Slaughter named "Samuel G." in existence at the date of the will, the afterborn son cannot be considered as described at all by the words in the will; and rejecting "Slaughter," only Samuel G. Hawkins could claim by the description, "son of Capt. John F." In truth, the case was a simple one of misdescription, without the appearance even of equivocation; and while the result reached was no doubt correct, the court should have reached it on the facts, without the aid of the testator's extrinsic expressions of intention, as was done by the Supreme Court of the United States in *Patch* v. *White,* 117 U. S., 210—a case quite similar to *Hawkins* v. *Garland,* with the difference that in *Patch* v. *White* the misdescription was of the *subject* devised, and not of the object of the testator's bounty.[20]

20. In Patch *v.* White, supra, the testator devised to his brother Henry a lot in the city of Washington, described as "lot number six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot 6 in square 403, but did own lot 3 in square 406, and this lot was claimed as that meant by the testator. It was conceded that this was not a case for declarations of intention, but it was held by the court that, rejecting the mistaken numbers as false demonstrations, there remained, in the light of the facts, a sufficient description in the will to give legal certainty. In the language of Mr. Justice Bradley: "The will on its face, taking it all together, with the clear implications of the context, and without the misleading words 'six' and 'three,' devises to the testator's brother Henry in substance

In *Hawkins* v. *Garland,* the case of *Maund* v. *McPhail,* 10 Leigh, 199, is cited, where declarations of intention were received to show that by "the new colonization society in Africa" the testator meant "The American Colonization Society for settling free persons of color in Africa." But this was clearly wrong, as the case was one of misdescription only. And as to the English case of *Beaumont* v. *Fell,* 2 P. Wms., 141, relied on by the court in *Hawkins* v. *Garland,* where, in the absence of

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as follows: 'I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot number ——, in square four hundred and ——, together with the improvements thereon erected and appurtenances thereto belonging—being a lot which belongs to me, and not specifically devised to any other person in this will.' In view of what has already been said, there cannot be a doubt of the identity of the lot thus devised. It is identified by ownership, by its having improvements on it, by its being a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words 'six' and 'three' from the description of the will, as not applicable (unless interchanged), to any lot which the testator owned; or instead of striking them out, supposing them to have been blurred by accident so as to be illegible, the residue of the description, in view of the context, so exactly applies to the lot in question that we have no hesitation in saying that it was lawfully devised to Henry Walker."

It seems remarkable that so sound a decision as this was dissented from by four of the justices, on the ground that the words "lot 6 in square 403" did describe a certain lot in the city of Washington, and the fact that it did not belong to the testator was a matter of no consequence—if the facts did not fit the will, so much the worse for the will. And it was said by Mr. Justice Woods, dissenting: "The only ground on which the plaintiff can base his contention that there is a latent ambiguity in the devise, is his offer to prove that the testator did not own the lot described in the devise, but did own another which he did not dispose of by his will. This does not tend to show a latent ambiguity. It does not tend to impugn the accuracy of the description contained in the devise. It only tends to show a mistake on the part of the testator in drafting his will. This cannot be cured by extrinsic evidence." And this view of the matter was taken in the well-known case of Kurtz *v.* Hibner, 55 Ill., 514 (S. C., 8 Am. Rep., 665), where there was a mistake similar to that in Patch *v.* White. But this mode of dealing with such mistakes is now thoroughly discredited. As has been well said (6 Harv. L. Review, p. 435, note): "The true view of such a case appears to be that there is no question of ambiguity in the matter. There is a mistake and the question is whether the will taken as a whole admits of a construction that will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are receivable, and then the inquiry is whether in view of all these facts anything passes." And see Browne, Parol Evid., p. 452. Such cases of mistake have been very frequent in some of the Western States because of the practice of designating property by range, township, section, and quarter section.

equivocation, declarations of intention were received, that has long since been overruled on this point. (See *Hiscocks* v. *Hiscocks,* 5 M. & W., 363; *Mostyn* v. *Mostyn,* 5 H. L. C., 168; 1 Jarm. Wills, 760, note 2; 2 Taylor Evid., § 1211, note 2.)[21]

I cannot close this imperfect discussion without a particular reference to the two authorities oftenest cited on questions of construction by parol evidence; I mean the celebrated Maxim and Commentary of Lord Bacon as to Ambiguities Patent and Latent, and the excellent treatise of Sir James Wigram on Extrinsic Evidence in Aid of the Interpretation of Wills.

1. The familiar maxim of Lord Bacon (Regula XXV), written about the year 1596, is as follows:

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.

It will be seen that the maxim itself speaks only of a latent ambiguity (*i. e.,* one not apparent on the face of the writing), and declares that it may be holpen by averment; "for when an ambiguity arises out of the facts it may be removed by averment of facts." But in his commentary on the maxim, Bacon speaks also of a patent ambiguity (*i. e.,* one apparent on the face of the writing), and declares that it is "never holpen by averment." And as to latent ambiguities, the commentary proceeds to make a distinction that does not appear in the maxim itself; and they are divided into two classes—viz., (1) the case of "equivocation," where averment of intention is allowed, and (2) the case of "variance," (*i. e.,* imperfect description), when

21. Some of the early English cases, in addition to Beaumont *v.* Fell, supra, admit declarations of intention in cases other than those of equivocation. See 1 Jarm., Wills (436). But these cases are overruled by Hiscocks *v.* Hiscocks, supra, which is followed by the recent English cases. And there are American cases in other States besides Virginia where Beaumont *v.* Fell has been followed. See Hawkins on Wills, p. 9, note 1, where it is said by the American editor: "In many American cases it is stated that parol evidence [i. e., of declarations of intention] is admissible in all cases of latent ambiguity, such as misdescription (without any equivocation), &c. But it is conceived that this statement arises from an omission to observe the distinction between evidence of the state of the testator's property or family, or of his surrounding circumstances, in aid of the construction of the will and direct evidence of the testator's intention." And in Wharton Evid., § 993, the author, referring to the early English cases, says: "But these cases are now discredited, and with them should fall the American rulings to which they for a time gave rise."

facts may be averred, but not intention, "because it does not stand with the words."

Of Bacon's maxim, it is finely said by Professor Thayer of Harvard University (6 Harv. L. R., 437): "The great name of the author gave it credit. It seemed to offer valuable help towards settling the troublesome question as to how far you could go in looking at outside facts to aid in construing a written text. To say that a difficulty which was revealed by outside facts could be cured by looking further into such facts had a reasonable sound; and when it was coupled with a rule that you could not in any way remedy a difficulty which was apparent on the face of the paper, there seemed to be a complete pocket precept covering the whole subject. . . . The maxim caught the fancy of the profession, and figured as the chief common place of the subject for many years. It still performs a great and confusing function in our legal discussions."

The maxim of Lord Bacon has undoubtedly caused much of the confusion that it is to be found in the cases on extrinsic evidence. For, as to latent ambiguities, the maxim itself does not draw any distinction between the case of "equivocation" and the case of "variance" or misdescription; and the courts frequently quote it as authorizing averments of intention (*i. e.,* declarations of intent) in all cases of a latent ambiguity. But it would seem that in the maxim Bacon is not thinking of averment of intention at all, but only of facts; for to the declaration that a latent ambiguity may be helped by averment he adds the reason, that an ambiguity arising from facts may be removed by facts. But in his commentary on the maxim Bacon does not confine himself to this homœopathic treatment of ambiguities—*similia similibus curantur;* but in the case of equivocation—"where one name and appellation doth denominate divers things"—declares that the remedy may come from averment of intention as well as of facts. When, therefore, it is said that "a latent ambiguity may be holpen by averment," the proposition itself is ambiguous, and requires careful discrimination as to the use of the words "ambiguity" and "averment," in order to avoid misconception. For ambiguities, though latent, may be so either by reason of equivocation or by reason of variance (misdescription), and averments

may be of facts only, or of intention. Now, all latent ambiguities may be helped by averment of facts; but only in the single case of equivocation can resort be had to averment of intention. And it will be found that this equivoque in the use of the words "ambiguity" and "averment" (or in modern phrase "parol evidence"), is common in the cases and text-books at the present time. It is greatly to be desired, in order that those who write of ambiguities may not themselves be ambiguous,[22] that the sort of ambiguity and of averment should in all cases be plainly expressed; and that such misleading expressions as "parol evidence is admissible to explain a latent ambiguity," or "the court may receive parol evidence of the intention of the testator," and the like, should be eschewed altogether. For, in the latter case, all parol evidence is, in a sense, "of the intention of the testator"; and the doubt arises whether declarations of intention are meant, or only facts and circumstances from which that intention may be inferred.

But it is as to patent ambiguities that the maxim of Bacon has caused "confusion worse confounded." The maxim itself implies that only latent ambiguities are holpen by averment; and the commentary confirms this by expressly declaring that patent ambiguities are never thus holpen. And the cases are to this day full of *dicta* to the effect that patent ambiguities are beyond the aid of extrinsic evidence; and even some of the decisions profess to proceed on this principle. But it must be manifest on a moment's reflection that the fact that a difficulty is apparent on the face of a writing is not of itself sufficient to bar the door against extrinsic evidence explanatory of the writer's

22. In this connection it may be observed that in the cases on the admissibility of extrinsic evidence the word "ambiguity" is used to signify any defect whatever in the words of a will—not merely the case of "equivocation" where the words are "sensible in more senses than one" (Wigram, Pl. 210), but cases of misdescription as well, and even where the testator has left a blank in his will, or accidently made a material omission. See Miller *v.* Travers, 8 Bing., 244. It would be well for judges and text-writers to bear in mind the weighty observation of Locke: "If men will not be at the pains to declare the meaning of their words, and definitions of their terms are not to be had, yet this is the least that can be expected, that in all discourses wherein one man pretends to instruct or convince another, he should use the same words constantly in the same sense."

meaning; and that the same doctrines should apply to all ambiguities, whether patent or latent, admitting evidence of the facts and circumstances in all cases, and of declarations of intention in the one case of equivocation. And that this is the law as to "facts and circumstances" to explain a patent ambiguity is established by the authorities;[23] and there are not wanting decisions directly in point that in the case of a true equivocation apparent on the face of a will declarations of intention are also admissible; and the fact that the equivocation is patent is immaterial. Thus in *Doe d. Gord* v. *Needs,* 2 M. & W., 129, the will showed on its face that there were two George Gords, viz.: George, the son of George Gord, and George, the son of John Cord. Then followed a devise to "George Gord the son of Gord"—thus making a patent ambiguity, and yet it was held that declarations of the testator were admissible; and Parke, B., speaking for the court, repudiated the idea that the fact that the ambiguity was patent could affect the rule which permits extrinsic expressions of intention when the words of the will describe well, but equally well, two or more persons or things. And to the same effect is the case of *Doe* v. *Morgan,* 1 Cr. & M., 235. And see *Hill* v. *Felton,* 47 Ga., 455 (15 Am. Rep., 643).

It seems, then, notwithstanding Bacon's maxim, that there is at the present day no real difference in the rules of law governing patent and latent ambiguities, and the most careful text-writers avoid the use of the terms altogether. In the language of Professor Thayer, from whom I have above quoted (6 Harv. Law Review, 424), "Ambiguities or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done. As to the resort to direct statements of intention in the one case of equivocation, viz.: where there are more than one whom the name or description equally fits, the right to resort to these declarations

23. See Wigram Ext. Evid. Pl. 80, 203; 1 Jarm. Wills. p. 745; Browne on Parol Evid., §§ 49, 126; Colpoys *v.* Colpoys, Jacob, 451; Goblet *v.* Beechey, 3 Sim., 24.

in such cases in no way depends on the difference between what is patent and latent."[24]

24. Both Wigram and Stephens discuss the subject of extrinsic evidence when there is a writing without the aid of Bacon's maxim, and without the use of the expressions patent and latent ambiguities. Taylor (on Evid., § 1212) quotes the maxim and a part of the commentary, but he adds (§ 1213): "The above quotation from Lord Bacon's works has been cited more out of respect to that great man than in the expectation that it will afford much practical information." And in Browne's Parol Evid., Practice, p. V, it is said: "It is also noteworthy that the ancient distinction between patent ambiguities and latent ambiguities, founded on a scholastic refinement by Lord Bacon, and echoed parrot-like and senselessly followed by generations of modern judges, has been effectually done away." And see § 126, where the law is stated as to wills without making any distinction between patent and latent ambiguities. See, however, § 49, where "mere evidence of intention" is declared incompetent in respect to a patent ambiguity. The context shows that the author's statement in § 49 refers to contracts, deeds, &c., while § 126 is applicable to wills only. It is not believed, however, that such a distinction between wills and other written instruments can be sustained. "In Chaplin on Wills (quoted in Browne on Parol Evid., p. 438), it is said: "Thus it appears that extrinsic evidence of the facts is admitted in all cases of both patent and latent ambiguities; while extrinsic direct evidence of intent is admissible in only one class of latent ambiguities." The author here excludes "declarations of intention" where a case of "equivocation" is apparent on the face of the will; but in saying that such declarations are inadmissible because the equivocation is patent he is in direct opposition to the case of Doe *v.* Needs, 2 M. & W., 149. Wharton alone among the text-writers accepts the doctrine of Bacon in its entirety. He says (§ 956): "The admission of evidence to explain ambiguities is confined to such ambiguities as are latent." And his supposed reason seems to be that "a patent ambiguity is subjective—that is to say, an ambiguity in the mind of the writer himself; while a latent ambiguity is objective—that is to say, an ambiguity in the thing he describes." There are no doubt some cases of patent ambiguity where no definite intention exists in the mind of the writer, and such cases, of course, cannot be "holpen by averment." See Wigram Ext. Evid., § 209; Breckenridge *v.* Duncan, 2 A. K. Marshall, 50 (12 Am. Dec. 359). But it is not true that every patent ambiguity indicates an absence of definite intention; and when this is not the case, the mere fact of patency is irrelevant upon the question of the admissibility of extrinsic evidence.

It should be added, in justice to Lord Bacon, that the examples he gives of patent ambiguities show that he had in his mind the facts of the Lord Cheney's case, 5 Co., 68 (decided in 1591), where declarations of intention were inadmissible (there being no equivocation), and where the doubt was not of a character to be removed by evidence of the facts and circumstances. In practice, indeed, a case would rarely occur, such as Doe *v.* Needs, supra, where a true equivocation is apparent on the face of the writing, and the possibility of a case may have escaped Bacon's attention in stating the law as to "averment of intention." And even as to the averments of facts, it may be observed that most cases of ambiguity apparent on the face of wills are not of a character to be relieved by such evidence; so that though the facts are admissible, they are not sufficient to solve

2. The Essay of Sir James Wigram on Extrinsic Evidence first appeared in 1831, and the Seven Propositions which are the text of his discussion are familiar to every lawyer.[25] He rejects Lord Bacon's maxim as his guide, on the ground that "the maxim itself requires much explanation"; though, in conclusion, he endeavors to show, by what amounts to a *tour de force*, that the maxim, properly understood, is not in conflict with the Seven Propositions. The keynote of Wigram's book is the correct principle—"that the judgment of a court, in expounding a will, should be simply declaratory of what is in the instrument;" but his work is marred by his failure to see clearly that actual intention, outside of the will, may be truly evidential, as forming a basis of inference as to the operative intention expressed in the words; and by the grudging reception he therefore accords to "declarations of intention," in the case even of equivocation. Indeed, so fearful is he of the malign influence of actual intention that he seems to hold that even facts and circumstances, if affected with that taint, are not to be received in evidence save in the one case of equivocation, where even express declarations of intention are receivable. He divides extrinsic evidence into such as is "explanatory of the words themselves," and "evidence of intention itself as an independent fact" as if the latter could not be explanatory of the words; and he speaks constantly of "evidence of intention," instead of "declarations, or statements, or expressions of intention," as if some facts even were not explanatory, but indirectly evidence of intention, and therefore not admissible except in the one case of equivocation. But the law is now settled, as we have seen, that it is not necessary (if, indeed, it were practicable) to divide facts into two classes, those which are "evidence of intention," and those which are not; but that all the material facts and circum-

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the difficulty. But on the other hand there are cases of imperfect description, or misdescription, and even some ambiguous expressions which, though apparent on the face of the will, the facts can relieve, and when this is the case such facts are undoubtedly admissible. See Wigram Ext. Evid., Pl. 209; Cole *v.* Rawlinson, 1 Salk., 234; Abbott *v.* Middleton, 7 H. L. C., 68; Smith *v.* Bell, 6 Pet. 68; Colton *v.* Colton, 127 U. S. 300; Puller *v.* Puller, 3 Rand. 83; Hatcher *v.* Hatcher, 80 Va., 169; Miller *v.* Potterfield, 86 Va. 876.

25. Wigram Ext. Evid., Pl. 12 to 19. The Seven Propositions are quoted in 1 Greenlf. Evid., § 287, note 1.

stances are in all cases admissible, and the rule of exclusion is confined to declarations of intention, and even these become admissible in the case of equivocation. (See *Drake* v. *Drake,* 8 H. L. C., 172; *Charter* v. *Charter,* L. R., 7 H. L. C., 364.)[26]

In conclusion, it may be permitted me to add that I believe that the rules of law as to the use of extrinsic evidence in aid of the interpretation of wills are founded on sound and enlightened principles, both as to the object of judicial exposition, and the means by which that object may be attained. The judicial expositor seeks to discover not what the words signify in the abstract and according to the rules of correct speech, but what they mean in the will as used by the testator. With all their imperfections on their head, they may still be pregnant with meaning, if only the interpreter have skill to discover it. And for this purpose he must place himself in the situation of the testator, and read the will in the light reflected from all the facts, not only the objective facts, if I may so call them, but the subjective facts as well; *i. e.,* those disclosing the testator's motives, opinions, and beliefs. The law does not require a perfect written expression of the testator's intention, but only such expression as can be deemed sufficient. It recognizes the truth of the adage *humanum est errare;* and though, for reasons of policy, it requires that a will shall be in writing, yet it allows a wide margin for mistakes. It does not make the writer, like Frankenstein, the slave of his own imperfect creature. It knows, in the language of Dr. Johnson, quoted by the Supreme Court of the United States in *Patch* v. *White,* 117 U. S., 210, that sudden fits of inadvertence will surprise vigilance; slight avocations will seduce attention, and casual eclipses of the mind will darken learning"; nor is it unfamiliar with that perverse trait by which we mean one thing and say another, for which Richard Grant White has coined the high-sounding name of heterophemy. The judicial expositor, therefore, does not sit aloft on the cold height of an ideal perfection, and survey the written words with a severe and critical eye, careless whether the will fails or not; but

26. In support of the observations which I have ventured to make on the justly celebrated treatise of Wigram, the reader is referred to Pl. 10, 107, 187, and 194; but their correctness can best be tested by a careful study of the whole work.

after a very human fashion, he seats himself in the armchair of the testator, puts on his spectacles, scrutinizes the will "by the four corners," reads its words by the light of all the surrounding facts and circumstances, corrects manifest errors, searches diligently for the faintest traces of intention—even receiving, in a proper case, evidence of the testator's extrinsic declarations; and so endeavors to construe the words of the will as the testator used them, bearing ever in mind that great maxim of the law which enjoins kindly, indulgent interpretation, that the will may prevail and not fail—*ut res magis valeat quam pereat.*